

¹ In the Court's initial screening of the complaint, it liberally construed the claims and found that Plaintiff's complaint had also stated a cognizable claim against Dr. Linda Rowe. The Court notes that to date, Dr. Rowe has not been served in this action. The Court has conducted a closer review of Plaintiff's complaint and has reconsidered its initial determination. Even upon liberally construing Plaintiff's complaint, the Court now finds that he fails to state a valid cognizable deliberate indifference claim against Dr. Rowe. Plaintiff names Dr. Rowe as a defendant in this action and alleges that she failed to give him adequate

1 other named Defendants from this action.

2 Before the Court is Defendants' motion for summary judgment on the grounds that the
3 undisputed facts show that they did not violate Plaintiff's rights under the Eighth Amendment and that
4 they are entitled to qualified immunity (docket no. 27). Plaintiff has filed an opposition to Defendants'
5 motion for summary judgment (hereinafter "Opposition") (docket no. 38). Plaintiff has also filed two
6 motions to compel discovery (docket nos. 24, 36).

7 **BACKGROUND**

8 The following statement of facts is based on declarations and documentary evidence submitted
9 by the parties. The facts are undisputed, unless otherwise noted.²

10 On February 6, 2001, Plaintiff underwent a "cholecistectomy," the removal of his gall bladder.
11 As a result of this operation, his body could no longer store bile, which plays a role in the digestion of
12 fats. Therefore, he was advised to avoid fatty foods. Following surgery, however, Plaintiff continued to
13 receive the regular prison diet served to inmates in the PBSP Security Housing Unit (hereinafter
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16 medical care. However, Plaintiff has not alleged facts which, if true, would support a finding of deliberate
17 indifference to serious medical needs against Dr. Rowe. Plaintiff alleges that on April 2, 2003, he was
18 interviewed by Dr. Rowe regarding his grievance seeking renewal of his "3000 Cal/Low Fat/Low Salt" diet.
19 (*Id.* at 12.) He claims Dr. Rowe insisted the "Heart Healthy" diet was adequate for him and denied the
20 grievance. (*Id.*) He also claims that she "reminded Plaintiff that he was already on a low fat diet [and that
21 she] would order further tests." (*Id.*) On April 18, 2003, Plaintiff alleges Dr. Rowe "ordered additional
22 tests: G.I., Glucose and Bilirubin [which he alleges is a fluid produced by the liver]." (*Id.*) While Plaintiff
23 alleges Dr. Rowe ordered additional tests, he does not indicate how Dr. Rowe was deliberately indifferent
24 to his medical needs in doing so. His main allegation appears to be that Dr. Rowe failed to give him the
25 benefit of an adequate inmate appeals process when she denied his grievance, however, that does not state
26 a claim for violation of Plaintiff's constitutional rights. Dr. Rowe's actions in processing Defendant's
27 grievance, without more, is not actionable under § 1983. *See Buckley v. Barlow*, 997 F.2d 494, 495 (8th
28 Cir. 1993) (prison grievance procedure is procedural right that does not give rise to protected liberty
interest requiring procedural protections of Due Process Clause). As such, Plaintiff has failed to state a
cognizable claim against Dr. Rowe. For the foregoing reasons, the Court summarily DISMISSES Dr.
Rowe from this action. *See* 28 U.S.C. 1915(e)(2)(B)(ii) (The Court "shall dismiss the case at *any* time" if
the Court determines that the action "fails to state a claim on which relief may be granted".) (emphasis
added).

² In support of Defendants' motion for summary judgment, Defendants submitted declarations, which the Court will cite to when necessary.

1 "SHU").

2 During a February 20, 2001 medical visit, Plaintiff reported that he had been experiencing
3 severe abdominal pain. Dr. Edward Kazel,³ a staff physician at PBSP, ordered a special low fat diet
4 called the "3000 Cal/Low Fat/Low Salt" diet for Plaintiff, with a follow-up appointment in ninety days to
5 assess the effect of the diet. (Hechanova Decl. in Supp. of Defs.' Mot. for Summ. J. ["Hechanova
6 Decl."], Ex. C.)

7 On March 6, 2001, PBSP's Dietician, J. Hartman, stated that Plaintiff was "tolerating the regular
8 diet without problems" and the "3000 Cal/Low Fat/Low Salt" diet was only recommended for ninety
9 days post-surgery. (Hartman Decl. in Supp. of Defs.' Mot. for Summ. J. ["Hartman Decl."] ¶ 5, Ex.
10 B.)

11 Dr. Kazel's request to put Plaintiff on the "3000 Cal/Low Fat/Low Salt" diet for ninety days was
12 approved on March 14, 2001.⁴

13 On May 16, 2001, Plaintiff was examined by Dr. Cooper, a staff physician at PBSP, for
14 complaints of nasal stuffiness and stomach burn that was controlled by taking Mylanta. (Hechanova
15 Decl. ¶ 4.)

16 On May 25, 2001, Plaintiff was again examined by Dr. Cooper for complaints of an upset
17 stomach. (*Id.* ¶ 5.) At that time, it was noted that Plaintiff was not in need of a special diet. (*Id.*)
18 Plaintiff's burning sensation in his stomach was once again controlled by taking Mylanta. (*Id.*)

19 On June 5, 2001, Plaintiff requested a medical appointment because it was time for his diet to
20 be renewed.

21 Plaintiff was given a medical appointment on June 8, 2001 with Dr. Jenkins, another staff
22 physician at PBSP. Plaintiff told Dr. Jenkins that his "3000 Cal/Low Fat/Low Salt" diet had alleviated
23 much of his pain, but that the diet been terminated. Dr. Jenkins diagnosed Plaintiff as fat-intolerant and
24 renewed the "3000 Cal/Low Fat/Low Salt" diet. Dr. Winslow approved the diet for one year. While
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27 ³ The Court notes that Plaintiff misspelled Dr. Kazel's name as Dr. "Kagel" in his complaint.

28 ⁴ Changes in an inmate's diet are only authorized by a physician and with the approval of the Health
Care Manager (Dr. Winslow) or the Chief Physician and Surgeon.

1 Plaintiff received this diet, he did not suffer from severe abdominal pain.

2 On or about June 25, 2002, Plaintiff stopped receiving the "3000 Cal/Low Fat/Low Salt" diet,
3 and he soon began to experience severe abdominal pain, particularly after he ate meat.

4 On July 31, 2002, Plaintiff had a medical appointment with Dr. Hechanova. Plaintiff alleges that
5 Dr. Hechanova told him he no longer needed a "3000 Cal/Low Fat/Low Salt" diet because "the regular
6 diet given to all SHU prisoners [was] already low in fat." Plaintiff alleges that Dr. Hechanova
7 prescribed Prilosec for Plaintiff's pain.⁵

8 On August 4, 2002, Plaintiff filed a prison grievance requesting a "3000 Cal/Low Fat/Low Salt"
9 diet. At the informal level of review, Plaintiff alleges that Dr. Hechanova granted his grievance and
10 renewed his "3000 Cal/Low Fat/Low Salt" diet for six months.

11 During a September 16, 2002 medical visit with Dr. Hechanova, Plaintiff reported feeling better.
12 Dr. Hechanova noted in the medical record that Plaintiff was still complaining of bloating, gaseousness,
13 and indigestion. The plan was to prescribe the medication Zantac and continue with Plaintiff's diet as
14 well as his current prescription medications, Mylanta and Prilosec. (Hechanova Decl. ¶ 8.) When
15 asked by Dr. Hechanova if he was feeling better after receiving his "3000 Cal/Low Fat/Low Salt" diet,
16 Plaintiff replied in the affirmative. (*Id.*)

17 During October 2002, PBSP initiated the "Heart Healthy" diet that began replacing the "3000
18 Cal/ Low Fat/Low Salt" diet for inmates who could not medically tolerate the regular diet.⁶ (Winslow
19 Decl. in Supp. of Defs.' Mot. for Summ. J. ["Winslow Decl."] ¶ 8.) The medical staff, including
20 Dietician Hartman, reviewed the findings of the American Diabetic Association and found that the
21 "Heart Healthy" diet was equivalent to the "3000 Cal/ Low Fat/ Low Salt" diet. (*Id.*)

22 Dietician Hartman noted that the "Heart Healthy" diet was a low fat diet that met the dietary
23 needs of Plaintiff as it contained 2,900 calories, with only 30% or less of the total calories derived from
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26 ⁵ Plaintiff alleges that Prilosec had "adverse effects upon Plaintiff's liver due to his [Hepatitis-A]
27 condition." (Compl. at 9.) However, the Court notes that Defendants' declarations do not address this
28 issue.

⁶ The other exceptions to the regular diet are four medical diets, including Dental Sort Diet, Gluten
Restricted Diet, Hepatic Diet, and Renal Diet. (Hartman Decl. ¶ 4.)

1 fat. (Hartman Decl. ¶ 6.) It was equivalent to the "3000 Cal/Low Fat/Low Salt" diet that contained
2 approximately 28% fat. (*Id.*) Plaintiff was counseled regarding the dietary guidelines he should follow
3 in selecting his food items from the "Heart Healthy" diet in order to meet his daily calorie requirements.
4 (*Id.* ¶¶ 6-7) Additionally, Dietician Hartman addressed Plaintiff's concerns about his food choices on
5 the "Heart Healthy" diet. (*Id.* ¶ 7) As a result of his interview with Dietician Hartman, it was decided
6 that Plaintiff was to be provided an extra sack lunch to further his food choices. (*Id.*)

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8 On or about February 14, 2003, Plaintiff's "3000 Cal/Low Fat/Low Salt" diet was stopped.
9 He began receiving high-fat items in his meals, such as creamed beef, hot dogs, and hamburgers. He
10 again experienced severe abdominal pain.

11 During a February 18, 2003 medical visit with Dr. Hechanova, Plaintiff requested the renewal of
12 his "3000 Cal/Low Fat/Low Salt" diet. Dr. Hechanova denied the request, however, telling Plaintiff that
13 PBSP's "Heart-Healthy" diet met his medical needs. On that same date, Plaintiff filed a prison grievance
14 seeking renewal of his "3000 Cal/Low Fat/Low Salt" diet. On February 19, 2003, Nurse P. Brous
15 denied the grievance, claiming the "Heart Healthy" diet was adequate for Plaintiff. Nurse Brous noted
16 that Dr. Hechanova had denied Plaintiff's request the prior day.

17 On February 25, 2003, Plaintiff resubmitted the grievance to the first formal level of review.

18 On April 2, 2003, Plaintiff was interviewed by Dr. Rowe regarding the grievance. Dr. Rowe
19 insisted the "Heart Healthy" diet was adequate for him and denied the grievance. She said she would
20 test him for ulcers, but that even if ulcers were detected, no low-fat/low salt diet would be ordered. She
21 also said that he might be referred to a gastroenterologist. Administrator Thacker filed a supplement to
22 Dr. Rowe's first-level decision, which endorsed her findings and her disposition of the grievance. It was
23 explained to Plaintiff that the new "Heart Healthy" diet was the equivalent to the old "3000 Cal/Low
24 Fat/Low Salt" diet and that therefore he was receiving a low-fat/low salt diet. (Thacker Decl. in Supp.
25 of Defs.' Mot. for Summ. J. ["Thacker Decl."] ¶ 4.) Consequently, the inmate appeal was partially
26 granted to further evaluate Plaintiff's medical condition. (*Id.*)

27 On or about April 7, 2003, Dr. Rowe ordered a series of blood tests for Plaintiff. The test
28 results indicated that the glucose level was low, bilirubin was high, and triglycerides were high. It was

1 explained to Plaintiff that these test results were only borderline low or high and, therefore, close to the
2 normal range. As a consequence of these blood test results, further blood tests were ordered and an
3 appointment was made with Dr. Soggee, a gastroenterologist in the PBSP Specialty Clinic. (Winslow
4 Decl. ¶ 9).

5 On April 21, 2003, Plaintiff resubmitted his grievance to the second formal level of review. The
6 grievance was "partially granted" by Dr. Winslow and Administrator Thacker on May 1, 2003. The
7 second-level decision noted that Plaintiff had been scheduled for a medical visit on May 2, 2003, and
8 that Dr. Rowe had conducted blood tests and had referred him to a gastroenterologist. Plaintiff's
9 request for the "3000 Cal/Low Fat/Low Salt" diet was denied because he did not meet PBSP's criteria
10 for a low-fat/low salt diet, which was reserved for inmates with chronic hypertension.

11 On or about May 1, 2003, at the request of Dr. Winslow, Administrator Thacker conducted
12 the review of the inmate's medical file. (Thacker Decl. ¶ 6.) At that time, Administrator Thacker noted
13 that Dr. Rowe had ordered additional blood tests, that the previous blood tests, while abnormal, were
14 not significant from a disease or illness standpoint. (*Id.*) Further, the medical records indicated that
15 Plaintiff was not hypertensive; therefore he did not meet the criteria for a low-fat/low salt diet. (*Id.*)
16 Because an appointment was scheduled for the gastroenterologist on May 15, 2003, the inmate appeal
17 was partially granted. (*Id.*)

18 On May 8, 2003, Dr. Hechanova examined Plaintiff and reviewed the lab results previously
19 ordered by Dr. Rowe. Plaintiff had continuing abdominal pain, the etiology of which was unknown. Dr.
20 Hechanova also noted that a referral had been made for Plaintiff to see a gastroenterologist on May 15,
21 2003. (Hechanova Decl. ¶ 12.)

22 On May 15, 2003, Plaintiff had a medical appointment with the gastroenterologist, Dr. Soggee,
23 who recommended that Plaintiff's low-fat/low salt diet be renewed. Dr. Soggee advised Plaintiff, in the
24 meantime, to avoid eating any fatty foods on his meal tray.

25 At a May 27, 2003 medical appointment, Plaintiff alleges that Dr. Hechanova declined to follow
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1 Dr. Soggee's recommendation, and did not put him on a low fat/low salt diet.⁷

2 On June 2, 2003, Plaintiff submitted his prison grievance for third formal level review.

3 On July 24, 2003, Plaintiff was once again seen by Dr. Soggee, who diagnosed Plaintiff as
4 fatty-foods intolerant and again recommended to renew the "3000 Cal/Low Fat/Low Salt" diet.

5 On July 31, 2003, Dr. Arenas followed Dr. Soggee's recommendations and issued a six-month
6 chrono⁸ for a low fat/low salt diet.

7 During a September 3, 2003 appointment with Dr. Arenas, Plaintiff reported that he still had not
8 received the low fat/low salt diet, and Dr. Arenas said he would check the status of his chrono.

9 On September 3, 2003, Plaintiff's grievance was denied at the third formal level of review by
10 Capt. P. Enriquez and Chief of Inmate Appeals Nancy Grannis. The decision summarizes Plaintiff's
11 medical treatment from May through September 2003 and states that Dr. Soggee issued a chrono for a
12 low fat/low salt diet for one year, beginning September 2, 2003.

13 During a September 18, 2003 appointment with Dr. Soggee, Plaintiff reported that he still had
14 not received his chrono for the low fat/low salt diet and that he had lost five to eight pounds because he
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17 ⁷ On May 27, 2003, Dr. Hechanova examined Plaintiff and noted a history of elevated lipids from
18 his lab results. The plan was to continue the present medications until a fasting lipid panel blood test was
19 completed. Further, it was noted that Plaintiff had not been on any hypertension medication for the past six
20 to twelve months. Dr. Hechanova's physician progress notes dated May 27, 2003 stated that Dr. Soggee
21 recommended a low-fat/low salt diet. Dr. Soggee also ordered an abdominal and pelvic CT scan, chest x-
22 ray, and a follow-up appointment in two months. The results of the exams were negative. Additional blood
23 tests performed on July 8, 2003 were normal. (Hechanova Decl. ¶ 13.) While Dr. Hechanova was aware
24 of the medical issue of Plaintiff's intolerance to fatty foods, it was his opinion that when Plaintiff met the
25 criteria for the "3000 Cal Low Fat/Low Salt" diet, Dr. Hechanova recommended it and requested
26 approval. (*Id.* ¶ 16.) However, the regular diet at PBSP was changed in October 2002 to the "Heart
27 Healthy" diet that Dr. Hechanova understood to be the nutritional and low fat equivalent of the "3000
28 Cal/Low Fat/Low Salt" diet. (*Id.*) The "3000 Cal/Low Fat/Low Salt" diet was no longer available. (*Id.*)
Additionally, Plaintiff's symptoms were consistently present, including bloating, gaseousness, and
indigestion, regardless of what diet he was on. (*Id.*) However, these conditions were being controlled by
medications. (*Id.*) It was Dr. Hechanova's opinion that Plaintiff received the appropriate medical care at all
times. (*Id.*)

⁸ A "chrono" is a form that allows prisoners to request certain medical accommodations as deemed
necessary by medical staff.

1 was selectively eating from the regular meal trays.⁹ Dr. Soggee said he would personally look into the
 2 matter.

3 On September 26, 2003, Plaintiff was informed that Dr. Winslow had disapproved
 4 Dr. Arenas's order for a low fat/low salt diet.

5 On October 14, 2003, Plaintiff reviewed his medical file. There was no paperwork in the file
 6 disapproving his requests for a low fat/low salt diet.

7 During an October 28, 2003 appointment with Dr. Arenas, Plaintiff reported that he had lost
 8 about 15 pounds because he was not receiving a proper diet. Dr. Arenas said she would recommend
 9 the low fat/low salt diet again, but it appears that her recommendation was overruled by her superiors.
 10 Petitioner apparently never received his chrono for a low fat/low salt diet.

11 On July 12, 2004, Dr. Hechanova examined Plaintiff. By that time, Plaintiff had been diagnosed
 12 by Dr. Soggee as having a mild liver condition of Gilbert's disease because of the elevated bilirubin
 13 (etiology unknown), and the condition of intolerance to fatty foods. (Hechanova Decl. ¶ 14.)

14 LEGAL STANDARD

15 Summary judgment is proper where it is established that there is no genuine issue of material fact
 16 and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex*
 17 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment is warranted against a party
 18 which "fails to make a showing sufficient to establish the existence of an element essential to that party's
 19 case, and on which that party will bear the burden of proof at trial." *Id.* A dispute about a material fact
 20 is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."
 21 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary
 22 judgment, all inferences to be drawn from the facts must be viewed in a light most favorable to the non-
 23 moving party. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.
 24 1987).

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 28 ⁹ According to his Declaration, Dietician Hartman reviewed Plaintiff's medical records to determine
 if there had been any significant weight loss. The medical records reflect that Plaintiff has reasonably
 maintained his weight within the recommended standard. (Hartman Decl. ¶ 8.)

1 It is not the task of the district court to scour the record in search of a genuine issue of triable
 2 fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of
 3 identifying with reasonable particularity the evidence that precludes summary judgment. *Id.* If the
 4 nonmoving party fails to do so, the district court may properly grant summary judgment in favor of the
 5 moving party. *See id.*; *see, e.g., Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026,
 6 1028-29 (9th Cir. 2001) (even if there is evidence in the court file which creates a genuine issue of
 7 material fact, a district court may grant summary judgment if the opposing papers do not include or
 8 conveniently refer to that evidence). Although the district court has discretion to consider materials in
 9 the court file not referenced in the opposing papers, it need not do so. *Id.* at 1029. "The district court
 10 need not examine the entire file for evidence establishing a genuine issue of fact." *Id.* at 1031.

11 Although the same standards for summary judgment apply when a *pro se* litigant is involved, the
 12 *pro se* litigant "should be given special latitude in responding to a summary judgment motion." *Evans v.*
 13 *Kinard*, 1997 U.S. Dist. LEXIS 15507, at 2 (S.D.N.Y. Oct. 6, 1997) (citing *Gonzalez v. Long*, 889
 14 F. Supp. 639, 642 (E.D.N.Y. 1995)) (internal quotation marks omitted); *Graham v. Lewinski*, 848
 15 F.2d 342, 344 (2d Cir. 1988) (noting that "special solicitude should be afforded *pro se* litigants
 16 generally, when confronted with motions for summary judgment"). A request for continuance of
 17 discovery at the Summary Judgment stage is governed by Federal Rule of Civil Procedure 56(f). Rule
 18 56(f) provides a mechanism whereby a party opposing a motion for summary judgment may state valid
 19 reasons why he is temporarily unable to present "facts essential to justify the party's opposition" to such
 20 motion. Fed. R. Civ. P. 56(f); *Weinberg*, 241 F.3d at 750. To comply with this requirement, Plaintiff
 21 must "show how additional discovery would preclude summary judgment and why [it] cannot
 22 immediately provide 'specific facts' demonstrating a genuine issue of material fact." *In re Silicon*
 23 *Graphics Inc. Securities Litigation*, 183 F.3d 970, 989 (9th Cir. 1999); *Mackey v. Pioneer Nat'l*
 24 *Bank*, 867 F.2d 520, 523 (9th Cir. 1989). Therefore, whether Plaintiff's request for further discovery
 25 was given due process is contingent upon whether Plaintiff's request satisfies the requirements of Rule
 26 56(f).
 27 **ANALYSIS**

28 **I. Rule 56(f)**

In addition to filing an Opposition to Defendants' motion for summary judgment, Plaintiff has also filed two motions to compel production of documents. The Court will construe Plaintiff's discovery motions as a request under Federal Rule of Civil Procedure 56(f) ("Rule 56(f)").¹⁰ See *Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987) (discovery motion was sufficient to raise issue of whether plaintiff was entitled to relief under Fed. R. Civ. P. 56(f)); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306 n.1 (9th Cir. 1986) (pending motion to compel discovery was sufficient to raise Rule 56(f) consideration); *Bailey v. City of New York*, 2003 U.S. Dist. LEXIS 7254, 32-33 (S.D.N.Y. May 2, 2003) (court construed request for additional discovery from a *pro se* plaintiff in response to a motion for summary judgment as an application pursuant to Fed. R. Civ. P. 56(f)).

Federal Rule of Civil Procedure 56(f) provides a device for litigants to avoid summary judgment when the non-movant needs to discover affirmative evidence necessary to oppose the motion. See *Garrett*, 818 F.2d at 1518. Rule 56(f) provides that a court may deny a summary judgment motion to permit discovery if it appears that a party cannot present facts essential to opposing the motion. Fed. R. Civ. P. 56(f). When a party moves for summary judgment before the opposing party has had a "realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely." *Burlington Northern & Santa Fe Ry. Co. v. The Assiniboine*, 323 F.3d 767, 774 (9th Cir. 2003). Denial of an application under Rule 56(f) is especially inappropriate "where the material sought is also the subject of outstanding discovery requests." *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986). Rule 56(f) requires an affidavit which sets forth the information sought and how it would preclude summary

¹⁰ Rule 56(f), entitled "When Affidavits are Unavailable," states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

1 judgment by creating a genuine issue of material fact. *See Hall v. Hawaii*, 791 F.2d 759, 761 (9th Cir.
2 1986).

3 By filing his discovery motions, Plaintiff meets Rule 56(f)'s procedural requirement that he
4 submit an "affidavit" setting forth the discovery requested. Although Plaintiff's discovery motions were
5 not entitled "Affidavit in Support of Rule 56(f) Request," the Ninth Circuit has stated that a court is free
6 to construe a discovery motion as a request under and in compliance with Rule 56(f). *See Garrett*, 818
7 F.2d at 1518; *Hancock*, 787 F.2d at 1306 n.1.

8 Plaintiff's motions were based on his own personal knowledge and signed under penalty of
9 perjury. (Pl.'s Aff. in Supp. of Notice and Mot. to Compel Disc. at 2.) He states in his discovery
10 motions that Defendants have failed to provide the following specific documents, despite his discovery
11 requests:

12 (1) All documents, rules, and/or reports concerning the
13 adjudication/disposition of inmate appeals, complaints or grievances regarding
14 lack of adequate medical treatment;

15 (2) All documents, reports, or rules regarding complaints by inmates in the
16 SHU at PBSP concerning lack of medical treatment including but not limited to inmate
complaints such as inmate appeal forms;

17 (3) All documents concerning the medical diagnosis, treatment, and/or triage
18 by PBSP medical staff and Defendants regarding inmates with special medical needs,
special diets, or special low fat/low salt medical diets;

19 (4) All documents, reports, or rules concerning any discipline and/or
20 reprimands issued to any member of the medical staff at PBSP, including Defendants in
connection with medical treatment provided to Plaintiff between 2/6/01 to 11/04;

21 (5) All documents, reports, or rules concerning internal communications of
22 PBSP concerning medical treatment provided to Plaintiff from 2/6/01 to 11/04;

23 (6) All documents, reports, or rules concerning internal communications at
PBSP regarding Plaintiff after 2/6/01;

24 (7) All documents, reports, or rules concerning medical treatment provided
25 to Plaintiff from 2/6/01 to 11/04;

26 (8) All documents, reports, or rules concerning Plaintiff's requests for medical
treatment from 2/6/01 to 11/04;

27 (9) All documents, reports, or rules indicating the knowledge of Defendants
28 of any of Plaintiff's needs for medical treatment from 2/6/01 to 11/04;

(10) All documents, reports, or rules concerning Defendants' responses to

1 Plaintiff's needs for medical treatment or special medical care diets from 2/6/01 to 11/04;

2 (11) All documents, reports, or rules concerning medical training received by
3 Defendants;

4 (12) All documents, reports, or rules concerning the role of Defendants and/or
5 the role of any one in the same position at PBSP in the provision of medical treatment to
6 inmates;

7 (13) All documents, reports and/or rules that relate to medical diets, special
8 medical diets, chronic care, inmate patient care, and chronic clinics;

9 (14) All documents, reports, or rules concerning the "Heart Healthy" diet;

10 (15) All documents, reports, or rules including but not limited to the medical
11 diet manual; California Department of Corrections' Operation Manual on medical care
12 concerning: special needs diets, chronic care, chronic clinics, medical staff duties, as well
13 as PBSP Operational Procedures for Medical/SHU concerning special diets and "Heart
14 Healthy" diets;

15 (16) All documents, reports, or rules concerning PBSP policies and
16 procedures prepared and distributed by the Health Care Compliance Unit consisting of
17 thirteen volumes;

18 (17) All documents, reports and/or rules concerning the Madrid¹¹ medical suit
19 including the special masters' report(s) and subsequent court orders/mandates as they
20 pertain to Defendants in Plaintiff's case and/or the PBSP medical department.

21 (*Id.*, Ex. AA [Pl.'s Req. for Produc. of Docs.] at 2-5.)

22 Rule 56(f) allows a district court to grant a continuance when a party opposing summary
23 judgment wishes to conduct further discovery. Ordinarily, summary judgment should not be granted
24 when there are relevant facts remaining to be discovered. However, the party seeking discovery bears
25 the burden of showing what specific facts it hopes to discover that will raise an issue of material fact.
26 *Harris v. Duty Free Shoppers Ltd. Partnership*, 940 F.2d 1272, 1276 (9th Cir. 1991) (citing
27 *Continental Maritime v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1395 (9th Cir. 1987)). The
28 party seeking continuance may not simply rely on vague assertions that additional discovery will
produce needed, but unspecified facts, and the mere hope that further evidence may develop prior to
trial is an insufficient basis for a continuance under Rule 56(f). *Continental Maritime*, 817 F.2d at
1395 (citing *Neely v. St. Paul Fire & Maine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978)).

As the Ninth Circuit stated in *Continental Maritime*, under Rule 56(f) "the party seeking a

¹¹ *Madrid v. Gomez*, No. C 90-3094 THE (N.D. Cal. filed Oct. 26, 1990).

1 continuance bears the burden to show what specific facts it hopes to discover that will raise an issue of
 2 material fact." *Id.* In the instant case, Plaintiff has not met this burden. By listing requested documents
 3 and information without explaining what specific, material facts these documents will likely produce,
 4 Plaintiff is simply making vague assertions that additional discovery will produce necessary but
 5 unspecified facts. Plaintiff has not shown in any of his filings what specific facts he hopes to discover
 6 that will raise an issue of material fact. Rather, Plaintiff has simply put forward a list of desired
 7 documents. Thus, Plaintiff has not met his burden under Rule 56(f).¹²

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 9 Turning to his Opposition, Plaintiff asserts in conclusory fashion that Defendants are not entitled
 10 to summary judgment because there are still genuine issues of material fact, and again simply recites the
 11 facts that he set forward in his complaint. (Pl.'s Opp'n. at 1-5). In fact, Plaintiff's argument in his
 12 Opposition is limited to a verbatim recital of the conclusory statement of facts found in his original
 13 complaint. (*Compare* Pl.'s Opp'n at 1-5 *with* Compl. at 1-19). Because Plaintiff has not shown that
 14 relevant facts remain to be discovered, the Court's failure to grant a continuance of discovery is
 15 appropriate under the standards contained in Rule 56(f) and is not a violation of Plaintiff's due process
 16 rights.

17 Plaintiff has merely relied on vague assertions in seeking his request for further discovery and
 18 has failed to demonstrate that the aforementioned discovery requests would preclude summary
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20 ¹² Plaintiff also alleges that he did not "receive access to requested documents and because PBSP-
 21 SHU does not provide translating staff or assistance for Plaintiff this has continuously and repeatedly
 22 resulted in miscommunication between Plaintiff and Law Library Staff." (Pl.'s Reply to Defs.' Opp'n to Pl.'s
 23 Mot. to Compel at 3.) Plaintiff asserts that the Law Library staff addressed his requests "with wrong
 24 and/or incomplete legal materials and Law Library services." *Id.* PBSP Technical Assistant H. Griffin
 25 stated that all of the materials requested by Plaintiff are available to Plaintiff through the Law Library and its
 26 resources. (Griffin Decl. in Supp. of Defs.' Opp'n to Pl.'s Mot. to Compel ["Griffin Decl."] ¶¶ 3-6). The
 27 Law Library staff has personally assisted Plaintiff with the documents requested. (*Id.* at ¶ 3.) Moreover,
 28 during February 2005, Plaintiff was permitted additional time in the Law Library because of his pending
 court cases. (*Id.* at ¶ 7.) Plaintiff's attempts to obtain information were unsuccessful not because of
 inadequate materials or services, but due to Plaintiff's inability to express his needs in English. (Griffin Decl.
 ¶¶ 3-6.) The fact that Plaintiff is incapable of expressing his needs to the Law Library Staff due to a
 language barrier is not the same issue as any discovery abuse on the part of Defendants that would cut in
 favor of Plaintiff's request under Rule 56(f).

1 judgment, therefore, the Court DENIES Plaintiff's request for a continuance pursuant to Rule 56(f).¹³

2 The Court will now address the merits of Defendants' motion for summary judgment.

3 **II. Deliberate Indifference to Serious Medical Needs**

4 Plaintiff alleges that Defendants were deliberately indifferent to his serious medical needs by not
5 providing Plaintiff with a necessary "3000 Cal/Low Fat/Low Salt" diet. Plaintiff claims he requires this
6 "3000 Cal/Low Fat/Low Salt" diet due to ongoing gastrointestinal problems stemming from the removal
7 of his gallbladder. Plaintiff alleges that without this diet he is gaseous, bloated, and in very much pain.
8 Plaintiff has stated that with the "3000 Cal/Low Fat/Low Salt" diet he feels "much better." Plaintiff
9 further alleges that despite his complaints, and despite the medical staff's knowledge of his medical
10 problems, Defendants refused to prescribe him the "3000 Cal/Low Fat/Low Salt" diet. Therefore,
11 Plaintiff alleges that Defendants were deliberately indifferent to his serious medical needs because they
12 were responsible for denying him the "3000 Cal/Low Fat/Low Salt" diet, which alleviates his suffering.

13 Defendants contend that they were aware of the existence of Plaintiff's medical needs and
14 administered to them when they were present. Defendants assert that they prescribed the "3000
15 Cal/Low Fat/Low Salt" diet for Defendants for a period of time longer than the ninety-day post surgery,
16 that there is actually "no special diet for post cholecystectomy patients,"¹⁴ and that they also prescribed
17 proper medication to Plaintiff for his upset stomach. Also, in addition to medications to control his
18 symptoms, Plaintiff has been given an additional sack lunch per day to supplement his calorie intake.
19 Defendants point to the fact that Plaintiff has been examined thoroughly by numerous physicians
20 (including a private specialist) and no discernible serious medical condition other than his fat intolerance
21 and a related mild liver condition has been found. Defendants assert that the meals supplied to all
22 prisoners are based on the "Heart Healthy" diet that is the equivalent of the "3000 Cal/Low Fat/Low
23 Salt" diet requested by Plaintiff in his complaint, thus rendering Plaintiff's action moot. Furthermore,
24 Defendants allege that the "3000 Cal/Low Fat/Low Salt" was no longer available after it was replaced
25

26
27 ¹³ Based on the Court's denial of Plaintiff's Rule 56(f) motion, Plaintiff's motions to compel
28 discovery (docket nos. 24, 36) are DENIED as duplicative.

¹⁴ Hechanova Decl. ¶ 11, Ex. M.

1 by the "Heart Healthy" diet. Defendants allege that the treatment Plaintiff received was reasonable and
2 that they were not "indifferent" to his serious medical needs under any standard.

3 Deliberate indifference to serious medical needs violates the Eighth Amendment's prohibition
4 against cruel and unusual punishment. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v.*
5 *Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by WMX Technologies,*
6 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). The analysis of a claim of "deliberate
7 indifference" to serious medical needs involves an examination of two elements: (1) the existence of a
8 prisoner's serious medical needs and (2) the establishment of a deliberately indifferent response by
9 Defendants to those needs. *McGuckin*, 974 F.2d at 1059.

10 **A. Existence of a Serious Medical Need**

11 A serious medical need exists if the failure to treat a prisoner's condition could result in further
12 significant injury or the "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104. The
13 existence of an injury that a reasonable doctor or patient would find important and worthy of comment
14 or treatment; the presence of a medical condition that significantly affects an individual's daily activities;
15 or the existence of chronic and substantial pain are examples of indications that a prisoner has a serious
16 need for medical treatment. *McGuckin*, 974 F.2d at 1059-60 (citing *Wood v. Housewright*, 900 F.2d
17 1332, 1337-41 (9th Cir. 1990)).

18 In the instant case, Defendants do not dispute that Plaintiff has a serious medical need.
19 Defendants understand that Plaintiff has a condition that causes him to suffer from chronic stomach pain.
20 In fact, Defendants allege that they have expended a great deal of time and energy administering to
21 Plaintiff's medical needs and attempting to diagnose Plaintiff further. Plaintiff has undergone a variety of
22 tests -- all ordered and/or approved by Defendants -- including blood tests, x-rays, and CT scans. In
23 doing so, Defendants have discovered that Plaintiff's condition only involves his intolerance to fatty
24 foods, which is a byproduct of Plaintiff's gall bladder removal. Consequently, Plaintiff also has a higher
25 than average lipid level in his blood and a mild liver condition.

26 **B. Establishment of Deliberate Indifference**

27 In order for deliberate indifference to be established, there must be a purposeful act or failure to
28

1 act on the part of the defendant and a resulting harm. *McGuckin*, 974 F.2d at 1060; *Shapley v.*
2 *Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). Such indifference may
3 appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be
4 shown in the way in which prison officials provide medical care. *See McGuckin*, 974, F.2d at 1062.
5 However, mere negligence or harassment related to medical problems is not enough to make out a
6 violation of the Eighth Amendment. *See Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981);
7 *see also Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir. 2004).

8 Similarly, a showing of nothing more than a difference of medical opinion as to the need to
9 pursue one course of treatment over another is insufficient, as a matter of law, to establish deliberate
10 indifference. *See Franklin*, 662 F.2d at 1344; *see also Toguchi*, 391 F.3d at 1059-60; *Sanchez v.*
11 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Mayfield v. Craven*, 433 F.2d 873, 874 (9th Cir. 1970). In
12 order to prevail on a claim involving choices between alternative courses of treatment, a plaintiff must
13 show that the course of treatment the doctors chose was medically unacceptable under the
14 circumstances and that they chose this course in conscious disregard of an excessive risk to the plaintiff's
15 health. *See Toguchi*, 391 F.3d at 1058; *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)
16 (citing *Farmer*, 551 U.S. at 837), *cert. denied*, 519 U.S. 1029 (1996).

17 A prison official is deliberately indifferent if he or she knows that a prisoner faces a substantial
18 risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v.*
19 *Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only "be aware of facts from which
20 the inference could be drawn that a substantial risk of serious harm exists," but he "must also draw the
21 inference." *Id.* If a prison official should have been aware of the risk, but was not, then the official has
22 not violated the Eighth Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290
23 F.3d 1175, 1188 (9th Cir. 2002).

24 In the instant case, Plaintiff has not shown that Defendants' decision not to renew his "3000
25 Cal/Low Fat/Low Salt" diet amounts to deliberate indifference. Plaintiff has not done so in part because
26 the Court finds that his "3000 Cal/Low Fat/Low Salt" diet was not an actual medical treatment for his
27 gastrointestinal complaints, but rather a 90-day precaution -- taken by PBSP physicians after the
28

1 removal of Plaintiff's gall bladder -- that was extended due to his complaints to staff physicians.
2 (Hechanova Decl. ¶ 11.) Additionally, Plaintiff was examined by a variety of doctors, often multiple
3 times per month. None of the examining physicians could find anything wrong with Plaintiff other than
4 his being fat-intolerant, and Plaintiff's intolerance to fatty foods was being controlled by medications
5 such as Mylanta, Prilosec, and Zantac. The Defendants, responding to Plaintiff's continual complaints,
6 ordered multiple tests to be run on Plaintiff, including blood tests, an abdominal and pelvic CT scan, and
7 chest x-rays. None of these tests revealed anything significant from a disease or illness standpoint.
8 (Thacker Decl. ¶ 6; Hechanova Decl. ¶ 13.) Even Dr. Soggee, the private gastroenterologist, could not
9 find anything wrong with Plaintiff beyond a "mild liver condition" and the condition of intolerance to fatty
10 foods. (Hechanova Decl. ¶ 14.)

11 Plaintiff's allegation that Defendants were deliberately indifferent by denying his request for the
12 "3000 Cal/Low Fat/Low Salt" diet fails because Plaintiff was already receiving the dietary needs
13 required for his specific medical condition. Defendants stress that the "Heart Healthy" diet that PBSP
14 switched to in 2002 is the "nutritional and low fat equivalent of the "3000 Cal/Low Fat/Low Salt" diet,
15 which was no longer available. (Hechanova Decl. ¶ 16.) The "Heart Healthy" diet was also proven to
16 meet the dietary needs of Plaintiff. (Hartman Decl. ¶ 6.) Further, Plaintiff has been counseled regarding
17 dietary guidelines he should follow in selecting his food items from the "Heart Healthy" diet. (*Id.*)
18 Before PBSP switched to the "Heart Healthy" diet as the standard for all inmates, Plaintiff's requests for
19 the "3000 Cal/Low Fat/Low Salt" diet were approved on numerous occasions. (Hechanova Decl. ¶
20 16.) However, after PBSP switched to the "Heart Healthy" diet, Defendants concluded that because
21 the diet was the nutritional equivalent of Plaintiff's requested diet, there was no reason to grant his
22 request for a low fat/low salt diet. (*Id.*) Thus, even if the Court assumes that Plaintiff's requested "3000
23 Cal/Low Fat/Low Salt" diet was the only medical treatment for Plaintiff's serious medical needs and not
24 the equivalent of the standard "Heart Healthy" diet, the fact remains that the "Heart Healthy" diet is an
25 *alternative medical treatment* for Plaintiff's serious medical needs. Even when construing the facts in
26 a light most favorable to Plaintiff, the Court still finds that Plaintiff's argument fails because a simple
27 showing of nothing more than a difference of medical opinion as to the need to pursue one course of
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1 treatment over another is insufficient, as a matter of law, to establish deliberate indifference. *See*
 2 *Franklin*, 662 F.2d at 1344; *see also Toguchi*, 391 F.3d at 1059-60; *Sanchez v. Vild*, 891 F.2d
 3 240, 242 (9th Cir. 1989); *Mayfield v. Craven*, 433 F.2d 873, 874 (9th Cir. 1970). In order to
 4 prevail on a claim involving choices between alternative courses of treatment, a plaintiff must show that
 5 the course of treatment the doctors chose was medically unacceptable under the circumstances and that
 6 they chose this course in conscious disregard of an excessive risk to the plaintiff's health. *See Toguchi*,
 7 391 F.3d at 1058; *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Farmer*, 551 U.S.
 8 at 837), *cert. denied*, 519 U.S. 1029 (1996). In the instant case, Plaintiff failed to show that the course
 9 of treatment chosen by Defendants was medically unacceptable under the circumstances, or that they
 10 chose the course in conscious disregard of an excessive risk to Plaintiff's health. Rather, Plaintiff has
 11 repeatedly argued that his requested "3000 Cal/Low Fat/Low Salt" diet merely helps him to "feel
 12 better." (Compl. at 9.) The physicians and dieticians at PBSP concur that PBSP's "Heart Healthy" diet
 13 is the equivalent of the "3000 Cal/Low Fat/Low Salt" diet requested by Plaintiff, and as such, it can be
 14 construed to be an acceptable alternative treatment for Plaintiff's medical condition. Accordingly, the
 15 Court finds that Defendants' course of treatment was medically acceptable and was not chosen in
 16 conscious disregard of excessive risks to Plaintiff's health.

17
 18 Based upon the foregoing reasons, Plaintiff has failed to show that Defendants have been
 19 deliberately indifferent to his serious medical needs. Even viewing the evidence and the inferences
 20 drawn therefrom in the light most favorable to Plaintiff, no reasonable jury could return a verdict for
 21 Plaintiff against Defendants. Accordingly, Defendants' motion for summary judgment as to Plaintiff's
 22 deliberate indifference claim is GRANTED.

23 **III. Qualified Immunity**

24 Defendants claim that summary judgment is proper in this case because they are entitled to
 25 qualified immunity from liability from civil damages.¹⁵

26 The defense of qualified immunity protects "government officials . . . from liability for civil
 27

28 ¹⁵ Plaintiff did not address qualified immunity in his opposition to Defendants' motion for summary judgment.

1 damages insofar as their conduct does not violate clearly established statutory or constitutional rights of
2 which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
3 The rule of qualified immunity "provides ample protection to all but the plainly incompetent or those
4 who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 495 (1991) (quoting *Malley v. Briggs*,
5 475 U.S. 335, 341 (1986)).

6 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a particular sequence of
7 questions to be considered in determining whether qualified immunity exists. A qualified immunity
8 analysis must begin with this threshold question: based upon the facts taken in the light most favorable to
9 the party asserting the injury, did the prison official's conduct violate a constitutional right? *Id.* at 201. If
10 no constitutional right was violated if the facts were as alleged, the inquiry ends and defendants prevail.
11 *See id.* If, however, a constitutional violation occurred, the second inquiry is whether the prison official
12 could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a
13 clearly established constitutional right. *Id.* at 201-02. "The relevant, dispositive inquiry in determining
14 whether a right is clearly established is whether it would be clear to a reasonable [prison official] that his
15 conduct was unlawful in the situation he confronted." *Id.*

16 The next step under *Saucier* is to consider whether the contours of the right were clearly
17 established, an inquiry that "must be undertaken in light of the specific context of the case, not as a
18 broad general proposition." *Saucier*, 533 U.S. at 201. The law has been clearly established that a
19 prison official who knows that a prisoner faces a substantial risk of serious harm from a delay or
20 interference with the treatment of a medical condition may not delay or interfere with that treatment.
21 *See McGuckin*, 974 F.2d at 1062; *Farmer*, 511 U.S. at 837.

22 Plaintiff alleges that Defendants were responsible for the denial of his request for the "3000
23 Cal/Low Fat/Low Salt" diet, in violation of his Eighth Amendment rights. Although the law was clearly
24 established that denial of medical care can violate an inmate's Eighth Amendment rights, the Court has
25 already found that Defendants' denial of Plaintiff's request did not rise to the level of denial of care. This
26 is due to the fact that Plaintiff was receiving medical treatment for his serious condition in an alternative a
27 form (the "Heart Healthy" diet, an extra sack lunch, and medication for his indigestion) that Plaintiff
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believes to be unacceptable.

However, even assuming that a constitutional right could have been violated, Plaintiff has not shown nor can he show that Defendants' behavior was unlawful from the perspective of a reasonable prison official in that situation. It would not have been clear to a reasonable prison official that a nutritionally equivalent diet would expose Plaintiff to a substantial risk of serious harm. The circumstances in the instant case certainly include a denial of the "3000 Cal/Low Fat/Low Salt" diet that Plaintiff requested; however, reasonable alternatives were chosen for Plaintiff's diet. Because the law did not put Defendants on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Saucier*, 533 U.S. at 202. Defendants have met their burden of proof in the moving papers. Meanwhile, Plaintiff did not introduce any evidence to show the existence of a genuine issue of material fact that it would have been clear to a reasonable prison official that denying Plaintiff his "3000 Cal/Low Fat/Low Salt" diet and in the alternative placing him on the "Heart Healthy" diet would expose him to a substantial risk of serious harm. Therefore, Defendants are entitled to judgment as a matter of law based on their qualified immunity defense.

CONCLUSION

For the foregoing reasons,

1. Defendants' Motion for Summary Judgment (docket no. 27) is GRANTED. The Clerk of the Court shall enter judgment in favor of Defendants.

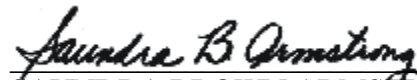
2. Defendant Linda Rowe is DISMISSED from this action.

3. Plaintiff's motions to compel discovery (docket nos. 24, 36) are DENIED as duplicative.

4. The Clerk of the Court shall terminate any other pending motions and close the file.

IT IS SO ORDERED.

DATED: September 30, 2005


SAUNDRA BROWN ARMSTRONG
United States District Judge